

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

HORACE THOMAS,

Plaintiff,

v.

MERLE BRUCE MD,

Defendant.

Case No. 2:14-cv-00619-MMD-CWH

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the California Department of Corrections and Rehabilitation, has submitted an application to proceed *in forma pauperis*, a civil rights complaint pursuant to 42 U.S.C. § 1983, and a motion for appointment of counsel. (Dkt. no. 1, 2, 5.) The Court now screens Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

**I. SCREENING STANDARD**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the

1 United States, and (2) that the alleged violation was committed by a person acting  
2 under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison  
4 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the  
5 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a  
6 claim on which relief may be granted, or seeks monetary relief against a defendant who  
7 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure  
8 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil  
9 Procedure 12(b)(6), and the court applies the same standard under § 1915 when  
10 reviewing the adequacy of a complaint or an amended complaint. When a court  
11 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the  
12 complaint with directions as to curing its deficiencies, unless it is clear from the face of  
13 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*  
14 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See  
16 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for  
17 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of  
18 facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*,  
19 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true  
20 all allegations of material fact stated in the complaint, and the court construes them in  
21 the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957  
22 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards  
23 than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).  
24 While the standard under Rule 12(b)(6) does not require detailed factual allegations, a  
25 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*  
26 *Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause  
27 of action is insufficient. *Id.*

28 ///

1           Additionally, a reviewing court should "begin by identifying pleadings [allegations]  
2           that, because they are no more than mere conclusions, are not entitled to the  
3           assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "While legal  
4           conclusions can provide the framework of a complaint, they must be supported with  
5           factual allegations." *Id.* "When there are well-pleaded factual allegations, a court should  
6           assume their veracity and then determine whether they plausibly give rise to an  
7           entitlement to relief." *Id.* "Determining whether a complaint states a plausible claim for  
8           relief . . . [is] a context-specific task that requires the reviewing court to draw on its  
9           judicial experience and common sense." *Id.*

10           Finally, all or part of a complaint filed by a prisoner may therefore be dismissed  
11           *sua sponte* if the prisoner's claims lack an arguable basis either in law or in fact. This  
12           includes claims based on legal conclusions that are untenable (e.g., claims against  
13           defendants who are immune from suit or claims of infringement of a legal interest which  
14           clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
15           fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28  
16           (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 17           **II. SCREENING OF COMPLAINT**

18           In the complaint, Plaintiff sues Defendant Merle Bruce, M.D., for events that took  
19           place while Plaintiff was incarcerated at High Desert State Prison in Susanville,  
20           California. (Dkt. no. 1 at 1.) Plaintiff alleges that Dr. Bruce is a resident of Reno,  
21           Nevada, who performed surgery on Plaintiff at the prison in Susanville, California. (*Id.* at  
22           2.) Plaintiff alleges three counts and seeks monetary damages. (*Id.* at 6, 9.)

23           In the complaint, Plaintiff alleges the following: On March 1, 2013, Bruce  
24           performed a surgical procedure to repair and wire Plaintiff's jaw. (*Id.* at 4.) "The  
25           procedure was irresponsible, unethical with no regard for [Plaintiff's] health or safety."  
26           (*Id.*) Before the surgery, Bruce did not remove Plaintiff's tooth or the root of the tooth.  
27           (*Id.* at 5.) Bruce failed to conduct reconstructive surgery and now Plaintiff's gums are in  
28           pain. (*Id.*) Plaintiff has a pinched nerve in his jaw and chin area, numbness, difficulty

1 speaking, pain, and suffering. (*Id.* at 6.) The lodged tooth aches daily and causes  
2 excruciating pain. (*Id.*) Plaintiff alleges malpractice (Count I), irreparable harm (Count  
3 II), and cruel and unusual punishment (Count III). (*Id.* at 4-6.)

4 The Eighth Amendment prohibits the imposition of cruel and unusual punishment  
5 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity,  
6 and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the  
7 Eighth Amendment when he acts with “deliberate indifference” to the serious medical  
8 needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an  
9 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the  
10 deprivation was serious enough to constitute cruel and unusual punishment—and a  
11 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985  
12 (9th Cir. 2012).

13 However, “a complaint that a physician has been negligent in diagnosing or  
14 treating a medical condition does not state a valid claim of medical mistreatment under  
15 the Eighth Amendment. Medical malpractice does not become a constitutional violation  
16 merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).  
17 Even gross negligence is insufficient to establish deliberate indifference to serious  
18 medical needs. See *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

19 The Court finds that Plaintiff fails to state a colorable claim. Based on the  
20 allegations, Plaintiff is alleging that Dr. Bruce committed malpractice which has left  
21 Plaintiff in a lot of pain. Because Plaintiff cannot state a § 1983 claim based on medical  
22 malpractice, the Court dismisses Counts I, II, and III with prejudice, as amendment  
23 would be futile.

### 24 **III. MOTION FOR APPOINTMENT OF COUNSEL**

25 Plaintiff has filed a motion for appointment of counsel. (Dkt. no. 2.) A litigant does  
26 not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights  
27 claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to  
28 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person

1 unable to afford counsel." However, the court will appoint counsel for indigent civil  
2 litigants only in "exceptional circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th  
3 Cir. 2009) (§ 1983 action). "When determining whether 'exceptional circumstances'  
4 exist, a court must consider 'the likelihood of success on the merits as well as the ability  
5 of the petitioner to articulate his claims *pro se* in light of the complexity of the legal  
6 issues involved.'" *Id.* "Neither of these considerations is dispositive and instead must be  
7 viewed together." *Id.* In the instant case, the Court does not find exceptional  
8 circumstances that warrant the appointment of counsel. The Court denies the motion for  
9 appointment of counsel.

#### 10 IV. CONCLUSION

11 For the foregoing reasons, it is ordered that the application to proceed *in forma*  
12 *pauperis* (dkt. no. 5) is denied as moot.


13 It is further ordered that the Clerk of the Court shall file the complaint (dkt. no. 1).

14 It is further ordered that the complaint is dismissed in its entirety, with prejudice,  
15 for failure to state a claim, as amendment would be futile.

16 It is further ordered that the motion for appointment of counsel (dkt. no. 2) is  
17 denied.

18 It is further ordered that this Court certifies that any *in forma pauperis* appeal  
19 from this order would be taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3).

20 DATED THIS 3<sup>rd</sup> day of June 2014.

21   
22 \_\_\_\_\_  
23 MIRANDA M. DU  
24 UNITED STATES DISTRICT JUDGE  
25  
26  
27  
28